MICHIGAN SUPREME COURT

Office of Public Information

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SUPREME COURT TO HOLD FIRST ORAL ARGUMENTS OF 2005-2006 TERM

LANSING, MI, October 12, 2005 – The Michigan Supreme Court will hear the first oral arguments of its 2005-2006 term next week.

As in past years, the Court's seven Justices will hear the first cases in the Old Courtroom in the Capitol. The Court will then adjourn and resume hearing oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice.

While the second day of oral arguments will also take place in the Hall of Justice, the Court will hold the final day of this month's oral arguments at the University of Detroit-Mercy School of Law in Detroit.

Among the 16 cases the Court will hear is *Cameron v Auto Club Insurance Association*, a no-fault insurance case, in which the plaintiffs seek to recover payment for attendant care their son received from 1996 to 1999. The defendant insurance company argues that the so-called "one year back" rule bars recovery of any attendant care costs that the plaintiffs incurred more than one year before they filed their lawsuit in 2000. The plaintiffs contend that the one-year back rule does not apply because their son was under 18 when they incurred expenses for his care.

Also before the Court is *People v Gillis*, in which the defendant was charged and convicted of first-degree felony-murder. While fleeing from police in his car, following his attempt at home invasion, the defendant struck and killed two other people. The defendant argues that his escape was not part of the home invasion, and that the home invasion cannot therefore be the felony that supports a felony-murder charge.

The other 14 cases before the Court involve a wide range of issues, including environmental, contracts, insurance, professional malpractice, divorce, tort, sexual harassment, estate, environmental, workplace, and criminal law, and court procedures.

Court will be held on **October 18, 19 and 20.** Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at*

http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, October 18, 2005
Morning Session (Oral arguments held at the old Supreme Court courtroom, Capitol Building)

PEOPLE v GILLIS (case no. 127194)
Prosecuting attorney: Timothy K. Morris/(810) 985-2400
Attorney for defendant John Albert Gillis: Timothy P. Flynn/(248) 625-0600
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Judith B. Ketchum/(269) 383-8900
Attorneys for amicus curiae State Appellate Defender Office and Criminal Defense Attorneys of Michigan: Jacqueline J. McCann/(313) 256-9833, John R. Minock/(734) 668-2200
Trial court: St. Clair County Circuit Court
At issue: The felony-murder statute, MCL 750.316(1)(b), provides that "Murder committed in the perpetration of [the enumerated felony]" is first-degree murder. In this case, the enumerated felony is home invasion; while fleeing in his car from police, the defendant struck and killed two people. Is the escape "in the perpetration of" the home invasion? This case also concerns whether, under the separation of powers doctrine, the Court of Appeals has the authority to direct the circuit court, on remand, to limit the charges on retrial to those the Court of Appeals determined should have "properly" been brought.
Background: During the afternoon of May 24, 2001, defendant John Gillis broke into Steven Albright's home. Albright confronted Gillis, who fled. Albright initially attempted to follow him, but then called 911 and gave the police a description of Gillis' vehicle; the police spotted Gillis' vehicle soon after. An officer attempted to stop the car, but Gillis sped away and led the police on a high-speed chase. The chase ended when Gillis, traveling the wrong way on I-69, collided with another car; the two people in the other car were killed. Gillis was arrested and charged with two counts of first-degree felony-murder. The jury convicted Gillis as charged; the trial court imposed the mandatory sentence of life without the possibility of parole. The Court of Appeals, in an unpublished 2-1 opinion, reversed the trial court and remanded for a new trial on second-degree murder. Gillis' attempt to escape, and the victims' deaths, "were not a part of the continuous transaction of or immediately connected to the home invasion," the majority stated. The prosecutor appeals.

SWEEBE v ESTATE OF SWEEBE (case no. 126913)
Attorney for plaintiff Marilyn Virginia Sweebe: Michael J. Beale/(989) 631-5490
Attorney for defendant Estate of Herbert Orville Sweebe and Gail Sweebe, Personal Representative: James P. Boardman/(989) 793-5891
Trial court: Midland County Circuit Court
At issue: What is the impact of the Employee Retirement Income Security Act (ERISA) on contractual arrangements in marriage and divorce? In this case, when the defendant and his wife divorced, each agreed to waive any interest in the other's insurance contract or policy. While this agreement was part of their divorce papers, it was not reflected in the defendant's insurance policy, which was provided by his employer and therefore subject to ERISA. Is the wife's waiver – and all such waivers of a spouse's right to ERISA-controlled benefits -- enforceable?

Background: Marilyn Sweebe and Herbert Sweebe divorced in 1986. Herbert Sweebe had a life insurance policy provided by his employer, which was covered by ERISA. As reflected in their divorce judgment, each agreed to give up any interest in the other's insurance contract or policy. Herbert Sweebe did not, however, change the listed beneficiary on the policy from Marilyn Sweebe to his new wife. Accordingly, when he died in 2001, the insurance proceeds were paid to Marilyn Sweebe. His surviving wife, acting on behalf of her deceased husband's estate, sued to enforce Marilyn Sweebe's waiver in the divorce judgment. But the trial court rejected the surviving wife's argument and ruled in favor of Marilyn Sweebe; the court reasoned that federal ERISA law preempted the waiver. The Court of Appeals reversed in a peremptory order, relying on *MacInnes v MacInnes,* 260 Mich App 280 (2004), which held that a petition to enforce a waiver is not governed by ERISA. Marilyn Sweebe appeals.

Afternoon Session (Oral arguments held at the Michigan Hall of Justice)

CAMERON, et al. v AUTO CLUB INSURANCE ASSOCIATION (case no. 127018)
Attorney for plaintiffs Diane and James Cameron, Co-Guardians of the Estate of Daniel Cameron: James A. Iafrate/(734) 994-0200
Attorney for defendant Auto Club Insurance Association: James G. Gross/(313) 963-8200
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Louis A. Smith/(231) 946-0700
Attorney for amicus curiae Insurance Institute of Michigan: John A. Yeager/(517) 351-6200
Attorney for amicus curiae Michigan Catastrophic Claims Association: Jill M. Wheaton/(734) 214-7629
Trial court: Washtenaw County Circuit Court
At issue: In this 2002 no-fault lawsuit, can the plaintiffs recover attendant care benefits that relate to care that their injured son received from 1996 through 1999? Or does MCL 500.3145(1), often referred to as the one-year-back rule, prevent the plaintiffs from recovering any attendant care benefits that were incurred more than one year before the date that their lawsuit was filed?
Background: Daniel Cameron was injured in an automobile accident on August 22, 1996. In this lawsuit, filed on May 9, 2002, his parents, Diane and James Cameron, sought to recover payment of attendant care benefits from the date of the accident through August 1999, when Daniel was admitted into in-patient rehabilitation. Their no-fault insurance company, Auto Club Insurance Association (ACIA), refused to pay the requested benefits. ACIA argued that the Camerons had not previously requested payment for those services. ACIA further contended that the Camerons' request for payment for three years' worth of services (from 1996 through 1999) was barred by MCL 500.3145(1), which, ACIA argued, only allows the Camerons to recover for services that were rendered in the year before their 2002 lawsuit was filed. The Camerons argued that the one-year-back rule was tolled in this case by MCL 600.5851(1) of the Revised Judicature Act, which, in certain circumstances, grants a person who is under 18 years old when a claim accrues additional time to bring "an action under this act." The Camerons maintained that this tolling statute applied and that, as a result, they were not bound by the one-year-back rule. The trial court denied ACIA's motion for summary disposition and instead entered judgment in the Camerons' favor, awarding them $182,500. In a published opinion, the Court of Appeals reversed. It held that, for causes of action arising after October 1, 1993 (the effective date of the current version of MCL 600.5851(1)), the one-year-back rule applies

because no-fault lawsuits are not "an action under this act" within the meaning of the tolling statute. The Camerons appeal.

DEAN v CHILDS, et al. (case no. 126393)
Attorney for plaintiff Marie Dean, Personal Representative of the Estates of Taleigha Marie Dean, Deceased, Aaron John Dean, Deceased, Craig Logan Dean, Deceased, and Eugene Sylvester: William G. Boyer, Jr./(586) 731-7400
Attorney for defendant Jeffrey Childs: Rosalind H. Rochkind/(313) 446-5522
Attorney for amicus curiae City of Detroit: Sharon D. Blackmon/(313) 237-3009
Attorney for amicus curiae The Michigan Municipal League and The Michigan Townships Association: Julie McCann O'Connor/(248) 433-2000
Trial court: Oakland County Circuit Court
At issue: The plaintiff's four children died in a house fire. She alleges that the firefighter in charge acted with gross negligence that was the proximate cause of her children's deaths. MCL 691.1407(2)(c). Were the firefighter's actions or omissions "the" proximate cause of the deaths under *Robinson v Detroit,* 462 Mich 439 (2000)?
Background: Marie Dean's Royal Oak house caught fire on April 4, 2000. The Royal Oak Township Fire Department was summoned; firefighter Jeffrey Childs was in charge. Dean's four children died as a result of the blaze. Dean sued, claiming that Childs was grossly negligent and that his gross negligence was the proximate cause of the children's deaths. Dean alleged that Childs hooked up to a fire hydrant a block away when one was available across the street, and that his attempts to fight the fire prevented another firefighter from rescuing the children. The trial court ruled that reasonable jurors could find that Childs' conduct amounted to gross negligence and was the proximate cause of the children's deaths. The Court of Appeals affirmed in a published opinion. Childs appeals.

GRAND TRUNK WESTERN RAILROAD, INC. v AUTO WAREHOUSING COMPANY (case no. 126609)
Attorney for plaintiff Grand Trunk Western Railroad, Inc.: Joseph J. McDonnell/(313) 963-3033
Attorney for defendant Auto Warehousing Company: Rick J. Patterson/(248) 377-1700
Trial court: Wayne County Circuit Court
At issue: The defendant leased premises from the plaintiff, and agreed to reimburse the plaintiff for certain injuries that might occur on the premises. When an employee sued the plaintiff for work-related injuries on the premises, the defendant refused to defend the plaintiff in the lawsuit and also refused to take responsibility for any payment the plaintiff might have to make to the employee. Later, when the plaintiff settled the employee's lawsuit, the defendant refused the settlement. The Court of Appeals found that the defendant was obligated to pay part of the settlement. Is the Court of Appeals correct? Is the defendant entitled to have the trier of fact determine the reasonableness of the settlement amount allocated to each injury?
Background: In December 1997, Terry Thomas, a brakeman/conductor employed by the plaintiff Grand Trunk Western Railroad, was injured in a work accident. Thomas sued the railroad, seeking recovery for his injuries under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq*. After he was injured again in a 1999 work accident, Thomas amended his complaint against the railroad to add a claim for the second accident, which occurred on premises leased by Auto Warehousing from Grand Trunk Railroad. The lease agreement

between Auto Warehousing and the railroad provided that Auto Warehousing would reimburse the railroad for certain injuries that occurred on the premises. After Thomas amended his complaint, the railroad notified Auto Warehousing of the claim and asked Auto Warehousing to defend it in the lawsuit and take responsibility for any payment made to Thomas for the 1999 accident. Auto Warehousing refused. The railroad filed this third-party action for indemnity, and the case was consolidated with Thomas' lawsuit. The railroad then notified Auto Warehousing that it intended to settle both of Thomas' FELA claims for $725,000, with $625,000 allocated to Thomas' 1999 injury. Auto Warehousing declined the settlement. The trial court found that Auto Warehousing was responsible for part of the settlement, and entered a judgment of $625,000 against Auto Warehousing and in favor of the railroad. The Court of Appeals affirmed in a published opinion. Auto Warehousing appeals.

Wednesday, October 19, 2005
Morning Session

OSTROTH, et al. v WARREN REGENCY, G.P., L.L.C., et al. (case no. 126859)
Attorneys for plaintiffs Jennifer L. Hudock and Brian D. Hudock: Donnelly W. Hadden/(734) 477-7744, Bettie K. Ball/(586) 468-9850
Attorney for defendant Edward Schulack, Hobbs & Black, Inc.: Ronald S. Lederman/(248) 746-0700
Attorney for amicus curiae ACEC/Michigan, Inc.: Joanne Geha Swanson/(313) 961-0200
Attorney for amicus curiae Southeastern Michigan Chapter NECA, Inc., Michigan Roofing Contractors Association, Inc., and Southeastern Michigan Roofing Contractors Association, Inc.: Joanne Geha Swanson/(313) 961-0200
Attorney for amicus curiae Integrated Designs, Inc.: Gary D. Quesada/(248) 647-9653
Attorney for amicus curiae American Institute of Architects, Michigan: Frederick F. Butters/(248) 647-9653
Attorney for amicus curiae Associated General Contractors of America Greater Detroit Chapter, Inc., and Michigan Chapter Associated General Contractors of America, Inc.: Peter J. Cavanaugh/(248) 647-9653
Attorney for amicus curiae Construction Association of Michigan (CAM), Sheet Metal & Air Conditioning Contractors National Association (SMACNA), Great Lakes Fabricators and Erectors Association (GLFEA), and Plumbing and Mechanical Contractors of Detroit (PMC): Michael J. Asher/(248) 746-0700
Attorney for amicus curiae Ecorse Board of Education: Corey D. Grandmaison/(313) 871-5500
Trial court: Macomb County Circuit Court
At issue: Under MCL 600.5839(1), no person may maintain an action against an architect or engineer arising out of a defective improvement to real property "more than six years after" use, occupancy, or acceptance of the improvement. Is this the sole limitation period for claims against architects and engineers? What about sections 5805(6) (two-year period for malpractice claims) and 5805(1) (three-year period for personal injury and property damage claims), and the accrual rules of sections 5827 and 5838?
Background: Jennifer Hudock claimed that she was injured by environmental hazards created when her workplace was renovated. She sued various parties related to the project and, after the litigation had begun, amended her lawsuit to also sue the architect of the renovation project, the

architectural firm of Edward Schulak, Hobbs & Black, Inc. The architectural firm argued that Hudock's claim against it was not timely filed. In response, Hudock argued that the applicable period of limitation was six years, as set forth in MCL 600.5839(1). Hudock further argued that, because a certificate of occupancy was never produced for the building, she did not know that the architectural firm might be culpable until after she started her lawsuit. The architectural firm responded that the proper statute of limitations is the two-year period that applies to lawsuits alleging professional malpractice. The trial court ruled in the architectural firm's favor, concluding that the limitations period was two years and that Hudock failed to file her claim within that time. The Court of Appeals reversed in a published opinion, holding that the limitations period was six years, as set forth in § 5839(1), and that the claim was therefore timely. The architectural firm appeals.

FEDERATED INSURANCE COMPANY, et al. v OAKLAND COUNTY ROAD COMMISSION, et al. (case no. 126886)
Attorney for defendant Oakland County Road Commission: Paul C. Smith/(313) 965-8300
Attorney for intervenor-appellant Attorney General, *ex rel* Michigan Department of Environmental Quality: Kathleen L. Cavanaugh/(517) 373-7540
Trial court: Oakland County Circuit Court
At issue: Was this action, brought pursuant to the environmental remediation provision of the Natural Resources and Environmental Protection Act (NREPA), filed within the six-year statute of limitations?
Background: Carl M. Schultz, Inc. discovered a leaking underground storage tank on its property in 1988. By 1991, Schultz constructed a building to house an on-site treatment facility to deal with that leak. The Department of Natural Resources ("DNR") did not approve a "site investigation work plan" until 1993. In the meantime, Schultz was notified by Oakland County Road Commission that there had been a petroleum release on its adjacent property. The DNR confirmed in 1995 that some of the petroleum on Schultz's property had come from the road commission's neighboring property. Schultz's insurance carrier, Federated Insurance Company, therefore notified the road commission in 1996 that it intended to file a "cost recovery action." This claim was not filed, however, until November 2000. The trial court dismissed Schultz's claim, granting summary disposition based on the statute of limitations. It ruled that the construction of the on-site treatment facility in 1991 was the date on which the six-year limitations period began to run, and that the 2000 lawsuit was filed too late. The Court of Appeals agreed in a published opinion. The Attorney General intervened by filing an application with the Supreme Court, arguing that the Court of Appeals disregarded the plain language of MCL 324.20140(1)(a), which provides for the statute of limitations to begin to run when on-site construction is begun for a remedial action selected or approved by the DNR. Since the DNR never selected or approved remedial action, the Attorney General argues, the statute of limitations was never triggered.

HARTER, et al. v GRAND AERIE FRATERNAL ORDER OF EAGLES, et al. (case no. 126255)
Attorney for plaintiffs Lacy Harter and Mike McClelland, individually and in their capacity as co-personal representatives of the Estate of Kegan McClelland: Victor S. Valenti/(248) 355-5555

Attorney for defendant Grand Aerie Fraternal Order of Eagles: John P. Jacobs/(313) 965-1900
Attorney for amicus curiae Benevolent and Protective Order of Elks and Moose International, Inc.: Thomas R. Charboneau, Jr./(248) 644-3600
Attorney for amicus curiae Michigan Defense Trial Counsel: Timothy A. Diemer/(248) 312-2800
Trial court: Livingston County Circuit Court
At issue: The defendant did not comply with a court order requiring it to provide discovery relating to insurance coverage, and the trial court entered a default against the defendant on the issue of liability. Following a trial on damages, the jury returned a verdict for the plaintiffs of almost $8 million. Did the trial court abuse its discretion in entering the default? Was there an improper settlement agreement between the plaintiffs and one defendant? Is the jury verdict excessive? Is a new trial warranted?
Background: Kegan McClelland, a two-year-old boy, drowned after he fell into an uncovered septic tank while attending a Family Fun Day on premises owned and operated by the Howell Aerie #3607 Fraternal Order of Eagles. The plaintiffs, Kegan's parents, sued several parties under Michigan's wrongful death act, including the Michigan State Aerie Fraternal Order of Eagles (State Aerie) and the Grand Aerie Fraternal Order of Eagles, which is the national organization. Kegan's mother, Lacy Harter, also asserted an individual claim for damages, as she was present when the accident occurred. Just before the trial began, after the jury had been impaneled, the trial court entered a default judgment against the Grand Aerie on the issue of liability. The court concluded that the Grand Aerie had not complied with the court's order to provide discovery relating to its insurance coverage and policy limits. The case proceeded to trial against the Grand Aerie and the Howell Aerie only, as the other parties were dismissed before trial. Since the Howell Aerie admitted liability, and since the Grand Aerie had been defaulted on the issue of liability, the purpose of the trial was only to determine the plaintiffs' damages. Before trial, the plaintiffs and the Howell Aerie entered into a "high-low agreement" that capped the Howell Aerie's liability at $300,000; as part of the agreement, the Howell Aerie was to make certain admissions at trial, including admitting liability and that it had an agency relationship with the Grand Aerie. The jury returned a verdict of $7,885,000, which was not apportioned between the two defendants. The trial court denied the Grand Aerie's post-trial motions and entered a judgment of $8,362,483.86 jointly and severally against both defendants. The Grand Aerie appealed to the Court of Appeals, which affirmed the trial court in an unpublished per curiam 2-1 decision. The Grand Aerie appeals. Among the issues on appeal is whether the trial court acted properly in defaulting the Grand Aerie and whether the agreement between the plaintiffs and the Howell Aerie was improper.

MALDONADO v FORD MOTOR COMPANY, et al. (case no. 126274)
Attorney for plaintiff Justine Maldonado: George B. Washington/(313) 963-1921
Attorney for defendant Ford Motor Company: Elizabeth P. Hardy/(248) 645-0000
Attorney for amicus curiae American Civil Liberties Union Fund of Michigan: Michael J. Steinberg/(313) 578-6814
Trial court: Wayne County Circuit Court
At issue: The trial court dismissed this sexual harassment case after finding that the plaintiff and her attorneys engaged in prejudicial pretrial publicity. The Court of Appeals reversed the trial court's dismissal and also reversed one of its evidentiary rulings. Did the trial court abuse its

discretion in dismissing the case? Did the trial court err when it ruled that the plaintiff could not offer into evidence the testimony of other female employees in order to establish the existence of a hostile work environment?
Background: Plaintiff Justine Maldonado, who was an employee of Ford Motor Company, sued Ford Motor Company and Daniel Bennett, a supervisor at Ford's Wixom assembly plant. Maldonado alleged that Bennett sexually harassed her and that he had also harassed at least five other women at the plant. She also claimed that Ford had notice of the harassment. After a two-day hearing, the trial court dismissed Maldonado's lawsuit on the ground that Maldonado and her attorneys engaged in pretrial publicity. Specifically, the trial court found that Maldonado and her attorneys publicized Bennett's expunged indecent exposure conviction, despite the court's warning not to do so, and that this publicity prejudiced Bennett's and Ford's ability to get a fair trial. Maldonado appealed, and also challenged two pretrial evidentiary rulings the trial court made. The Court of Appeals reversed the trial court's order dismissing the lawsuit, but remanded to the trial court for an evidentiary hearing to determine, among other things, whether Ford was actually prejudiced by the actions of Maldonado and her attorneys. The Court of Appeals also held that Maldonado could offer the testimony of other female employees to prove the existence of a hostile work environment at the Wixom plant. Ford Motor Company appeals.

Afternoon Session

HUBBARD v NATIONAL RAILROAD PASSENGER CORPORATION a/k/a AMTRAK, et al. (case no. 127240)
Attorney for plaintiff Keith A. Hubbard: Steven A. Hicks/(517) 394-7500
Attorney for defendant National Railroad Passenger Corporation, a/k/a Amtrak: Mary C. O'Donnell/(313) 963-3033
Trial court: Wayne County Circuit Court
At issue: The plaintiff, a train engineer, filed a negligence claim under the Federal Employers' Liability Act (FELA); he claimed that he was injured due to a design defect in his train cab seat. Does he need to support this claim with expert testimony?
Background: Keith A. Hubbard, a senior train engineer, was injured in a 1988 accident at a railroad crossing in Canton Township. He was operating the train out of a "cab car," which does not have power, but contains all of the controls necessary to operate the train. The locomotive's side mirror struck a truck that was partially in the crossing. Hubbard tried to get out of his seat, but he had trouble because the opening to the exit was narrow and the seat did not swivel without releasing a latch. He jumped over the edge of the arm rest, hit the floor, and was injured. Hubbard sued his employer Amtrak under the Federal Employers' Liability Act (FELA), 45 USC 51, *et seq*. Hubbard contended that there is a design flaw in the cab seat, but he did not produce expert testimony to support his theory. The trial court dismissed Hubbard's FELA claim, concluding that he failed to produce sufficient evidence that the seat was defective. The Court of Appeals reversed, with one judge dissenting. Amtrak appeals.

PEOPLE v McKAY (case no. 126930)
Prosecuting attorney: Jason W. Williams/(313) 224-8109
Attorney for defendant Christopher McKay: Anne Yantus/(313) 256-9833
Trial court: Wayne County Circuit Court

At issue: In sentencing criminal defendants, trial courts use statutory "offense variables" which assign a number of points based on various factors in the crime; the number of points is used to determine the length of the sentence. Offense Variable (OV) 13 authorizes a 25-point score where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. The statute directs the court to count "all crimes within a 5-year period, including the sentencing offense." May the crimes occur within *any* five-year period, or only the five-year period immediately preceding the sentencing offense?
Background: On January 24, 2003, Christopher McKay robbed a Bank One branch in the city of Harper Woods. McKay pled no contest to one count of bank robbery, as a fourth habitual offender, and was sentenced to nine to 15 years' imprisonment. He argues that the trial court judge imposed this sentence based on inaccurate information. Specifically, McKay argues that his nine-year minimum sentence was the result of the trial court's error in scoring Offense Variable 13 at 25 points. Such a score is appropriate if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. For the purposes of scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In this case, the judge based the 25-point score on three 1990 armed robbery convictions; at the time of the 2003 bank robbery, McKay was on parole for these three convictions. McKay argues that the five-year period has to include the sentencing offense, and that his 1990 convictions are outside the proper five-year period and cannot be considered. The Court of Appeals denied leave to appeal. McKay appeals.

PHOENIX INVESTMENT HOLDING COMPANY, INC., et al. v NOSAN & SILVERMAN HOMES, L.L.C., et al. (case no. 126561)
Attorneys for plaintiffs Phoenix Investment Holding Company, Inc., Woodland Excavating, L.L.C., and Willacker Homes, Inc.: Scott R. Forbush, Pamela C. Dausman/(517) 371-8184
Attorney for defendants Nosan & Silverman Homes, L.L.C., Silverman Development Company, Silverman Homes, Inc., Silverman Construction Company, and Toll Brothers, Inc.: Jonathan B. Frank/(248) 642-0500
Trial court: Oakland County Circuit Court
At issue: This dispute concerns the alleged breach of a contract for the construction of a condominium development. Among other issues, the Supreme Court will consider whether the Court of Appeals erred in finding that the contract's liquidated damages provision did not cover a non-monetary default, such as the failure to enter into excavation contracts.
Background: The parties contracted for the purpose of building a condominium development on land called "Trotters Pointe," in Lyon Township, Oakland County. The development project began in December 1995 and continued up to the time that the plaintiffs filed this lawsuit in October 2001. In the course of the project, the parties executed multiple agreements, including a 1997 Option Agreement. The 1997 Option Agreement was amended by a First Amendment in June 1998 and a Second Amendment in August 1999. The parties also executed an excavation contract ("1996 Excavation Contract"), as well as an addendum to the excavation contract. The parties cannot agree on the meaning of these various contracts. Among the disputed issues is whether the parties agreed that the liquidated damages provision would cover a non-monetary default, such as the failure to enter into excavation contracts. The parties also do not agree as to the extent of the guaranty provided by defendant Toll Brothers. The trial court dismissed all the

plaintiffs' claims against the defendants, but the Court of Appeals reversed in part. The defendants appeal.

STOKAN v HURON COUNTY (case nos. 126706-7)
Attorney for plaintiff Richard V. Stokan: David W. Hearsch/(810) 648-2452
Attorneys for defendant Huron County: Daniel P. Dalton, Andrey T. Tomkiw/(248) 591-7000
Trial court: Huron County Circuit Court
At issue: The plaintiff, a former sheriff, left the county's service at age 48 and, seven years later, applied for retirement benefits. Is he entitled to benefits where the applicable county resolution states that benefits will be provided "upon retirement"? Before trial, mediators valued the case at $40,000 and the plaintiff rejected that award; the jury returned a verdict of $14,000; in addition, the trial court ordered the county to pay the plaintiff's health insurance premiums. Is the defendant county entitled to mediation sanctions?
Background: Richard V. Stokan left employment with Huron County's sheriff department in 1988 when he was 48 years old, after 20 years of service. In 1995, when Stokan reached the age of 55, he applied to Huron County for health care benefits pursuant to Huron County Board of Commissioners Resolution 23-83, which provides such benefits "upon retirement." The county denied Stokan's request, taking the position that Stokan was ineligible because he failed to meet the age requirement at the time of retirement. Stokan sued. The trial court concluded that Stokan was entitled to county-paid health insurance benefits commencing in 1995; the court also ordered a trial on the issue of damages. A jury determined that Stokan was entitled to $14,000; in addition, the trial court ordered the county to pay Stokan's health insurance premiums. The county moved for mediation sanctions under Michigan Court Rule (MCR) 2.403(O), noting that the case was valued at $40,000 at a pretrial mediation session, that Stokan rejected that valuation, and that the jury's verdict was only $14,000. Under the court rule, a party who rejects a pretrial mediation award "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." Stokan responded that, because the trial court also ordered the county to pay his premiums, the trial award exceeded the mediation award. The trial court denied the request for mediation sanctions. The Court of Appeals affirmed all trial court rulings. Huron County appeals.

Thursday, October 20, 2005
Morning Session Only (Oral arguments held at the University of Detroit-Mercy School of Law, Detroit)

PEOPLE v JACKSON (case no. 125250)
Prosecuting attorney: Danielle Walton/(248) 858-0656
Attorney for defendant Nicholas James Jackson: Ralph Musilli/(586) 778-0900
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Herbert R. Tanner, Jr./(517) 334-6060
Attorney for amicus curiae Wayne County Prosecutor's Office: Timothy A. Baughman/(313) 224-5792
Trial court: Oakland County Circuit Court
At issue: In this criminal sexual conduct case, the trial court admitted into evidence statements that the complainant's father – who died before the case went to trial – made regarding his

observation of the sexual encounter between his son and the defendant. Did the trial court's ruling violate the United States Supreme Court's decision in *Crawford v Washington*, which limits the admissibility of "testimonial" hearsay? Also, did the trial court err when it ruled that the defendant could not present testimony that his accuser had been coaxed into making a false accusation of sexual abuse in the past?

Background: Nicholas Jackson, then 19, and his nine-year-old stepbrother were discovered engaged in oral sex by the nine-year-old boy's father. The boy claimed that Jackson forced him to do it, and later said that Jackson had assaulted him once before. Jackson contended that the boy initiated the contact while Jackson was sleeping, and that the boy's father may have put him up to it. Because the boy's father died before trial, the trial court permitted testimony by the police officer who took the father's statements at the police station. It also ruled that Jackson could not explore, at trial, allegations that the boy had been coaxed into making a prior false assertion of sexual abuse against his biological mother's boyfriend. The trial court concluded that this evidence was not relevant and was prohibited by the rape shield law. A jury convicted Jackson of three counts of first-degree criminal sexual conduct. The Court of Appeals affirmed Jackson's convictions, concluding that the father's representations to the police were admissible under the "excited utterance" and "catch-all" hearsay exceptions. Although the allegations of a prior false accusation should have been admissible, Jackson had failed to make an offer of proof under the rape shield law, the appellate court said. Jackson appeals. He argues that the father's statements are inadmissible under *Crawford v Washington*, and that he should have been permitted to present evidence that the accusation was false.

SORKOWITZ, et al. v LAKRITZ, WISSBRUN & ASSOCIATES, P.C. et al. (case no. 126562)

Attorney for plaintiffs Betty Sorkowitz, Individually and as Trustee for the Morris & Sarah Friedman Irrevocable Trust, Betty Sorkowitz, Trustee for the Sarah Friedman Trust, Betty Sorkowitz, Personal Representative for the Estate of Sarah Friedman, Betmar Charitable Foundation, Inc., Julie Shiffman, Janet Jacobs, Carolyn Jacobs, Renee Jacobs, Jodie Shiffman and Jeffrey Shiffman: Robert H. Roether/(248) 735-0580

Attorney for defendants Lakritz, Wissbrun & Associates, P.C., a/k/a Lakritz, Wissburn & Associates, P.C., Gerald Lakritz and Kenneth Wissbrun, a/k/a Kenneth Wissburn: Noreen L. Slank/(248) 355-4141

Attorney for amicus curiae State Bar of Michigan's Probate and Estate Planning Section: John J. Bursch/(616) 752-2000

Trial court: Oakland County Circuit Court

At issue: Can extrinsic evidence be admitted in a legal malpractice case to show that an attorney provided negligent tax planning advice, resulting in a reduction in the estate's value? Is an expert's affidavit that a standard tax avoidance clause was not included in an estate planning document "extrinsic evidence?"

Background: This is a legal malpractice action brought by beneficiaries of the Morris and Sarah Friedman Irrevocable Trust and by other plaintiffs. In 1988, Morris and Sarah Friedman retained attorneys Gerald Lakritz and Kenneth Wissbrun to prepare estate planning documents, including the Trust. The Trust did not contain a "Crummey clause," a provision which permits an estate to take advantage of certain generation-skipping tax exemptions. The plaintiffs allege that the value of the estate was diminished by over $1,000,000 because a Crummey clause was not incorporated into the trust. The defendants argued that the plaintiffs could not prove that the

decedents' intent was frustrated by the estate plan. In response, the plaintiffs provided the affidavit of an expert attesting that the standard of practice requires estate planning attorneys to discuss and recommend the use of a Crummey clause, and that the failure to include the clause in the type of irrevocable trust at issue is unusual and extraordinary. The trial court dismissed the plaintiffs' complaint, citing *Mieras v DeBona*, 452 Mich 278 (1996). In *Mieras*, the Supreme Court held that a plaintiff must be able to establish legal malpractice in the preparation of estate planning documents from the documents themselves. Extrinsic evidence – evidence not contained in the documents -- is not admissible to establish that the decedents' intent was frustrated. In a published 2-1 opinion, the Court of Appeals reversed the trial court and remanded for further proceedings. Two judges held that the *Mieras* four-corners rule does not apply under the circumstances of this case because the alleged malpractice consisted of failing to minimize inheritance tax exposure. This is not a case where competing heirs are arguing over the testators' intent, the majority reasoned. The defendants appeal.

PEOPLE v ROBINSON (case no. 126379)
Prosecuting attorney: Larry L. Roberts/(313) 224-7011
Attorney for defendant Kevin M. Robinson: Neil J. Leithauser/(248) 545-2900
Trial court: Wayne County Circuit Court
At issue: What are the elements of accomplice liability under MCL 767.39? Is a defendant's intent to cause great bodily harm sufficient to support a conviction for aiding and abetting second-degree murder?
Background: Kevin Robinson and a companion, Samuel Pannell, went to the home of Bernard Thomas to "f**k [Thomas] up." The two men punched and kicked Thomas several times, knocking him to the floor. Robinson told Pannell to stop but Pannell kept kicking Thomas. Robinson left; as he got in his car, he heard a gunshot. Thomas died as a result of the gunshot wound, not the beating. Robinson was charged with first-degree murder. Following a bench trial, he was convicted of second-degree murder under a "great bodily harm" theory. But the court specifically found that Robinson agreed to no more than roughing Thomas up and stated that the sentence would reflect this. The Court of Appeals reversed and reduced the conviction to assault with intent to do great bodily harm. A necessary element of murder was missing, the Court of Appeals reasoned, because the trial court found that the defendant intended to inflict great bodily harm only and that the injuries he inflicted with that intent did not cause Thomas' death. The prosecutor appeals.

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